



## Westlands Water District

3130 N. Fresno Street, P. O. Box 6056, Fresno, CA 93703

September 4, 2015

### VIA EMAIL

California Department of Water Resources  
Attn: Sustainable Groundwater Management Section  
P.O. Box 942836  
Sacramento, CA 94236

[sgmps@water.ca.gov](mailto:sgmps@water.ca.gov)

Re: Westlands Water District's Comments on the Draft Basin Boundary Modification Regulations

Dear Sir or Ma'am:

Westlands Water District ("Westlands") appreciates the opportunity to provide comments to the Department of Water Resource's ("DWR" or "Department") Draft Basin Boundary Modification Regulations ("Regulations"), and the significant effort by DWR staff to develop them under a demanding timeline.

Westlands' comments can be primarily divided into three separate categories: definitional concerns, substantive concerns, and procedural concerns. Often these concerns overlap. For example, under Issue 2 "any person" is undefined. Who may protest a boundary modification request raises not only significant substantive concerns in terms of who has the proper quantum of interest in a boundary modification request to justify a protest, but also procedural concerns in terms of the delay in having boundary modification requests granted, with implications for a Groundwater Sustainability Agency ("GSA" or "agency") meeting the timelines under the Sustainable Groundwater Management Act ("SGMA").

Westlands' comments are organized in an "Issue, Discussion, Recommendation" format for clarity as to the issue and Westlands' recommendation for resolution of the issue identified. For further clarity, terms that raise a specific issue for discussion are underlined.

**Issue 1:** Section 341(n) defines "hydrogeologic barrier" to refer to any subsurface feature that significantly impedes lateral groundwater flow.

**Discussion:** "Significantly impedes" is undefined, and does not provide an indication of what agency will determine whether an impediment is significant. Furthermore, "lateral" groundwater

flow does not capture the reality of groundwater movement underground. Water in aquifers flows both laterally and vertically, unless there is a hydrologic barrier to prevent that movement. The failure to appreciate that groundwater flows both vertically and laterally is systemic throughout SGMA. This failure manifests itself in both Bulletin 118 and these Regulations, and betrays a fundamental error in the assumptions that determine basin and subbasin boundaries. This flawed assumption as to the two-dimensional lateral nature of groundwater basins will likely present significant challenges toward implementation of SGMA in the future. Procedurally as it relates to these Regulations, this is likely a category of incorrect assumptions anticipated in section 346.6 of these Regulations, to which Issue 17 addresses, and which should be subject to the dispute resolution process recommended in Issues 16 and 17.

**Recommendation:** Provide a provision with parameters for whether a subsurface feature's impediment of both lateral and vertical groundwater flow is significant. Among these parameters should be soil porosity and permeability and the rate of groundwater flow. DWR should also then take these parameters and apply them to reflect basins that may be stacked vertically relative to each other, but are separated by a hydrogeologic barrier.

**Issue 2:** Section 343.12(a) states that “any person may protest a basin modification request...”

**Discussion:** “Any person” provides too much breadth for protest and may prevent implementation of Groundwater Sustainability Plans (“GSP”). In an effort to ensure both the efficient and durable implementation of GSPs, allowing “any person” to protest may very well subvert the timeline that SGMA has provided for. While it is entirely appropriate to allow those individuals with a certain quantum of interest to protest a boundary modification request, DWR must draw the line somewhere to strike the right balance between public input, environmental protection, and the orderly administration of public resources.

Further, “basin modification” is an undefined term. The proper term likely intended is a “boundary modification.” This same issue raises itself in § 343.12(a)(4) as well.

**Recommendation:** Require a protestant to a boundary modification request to demonstrate a reasonable likelihood of injury to a legal right to groundwater. Correct using the proper term “boundary modification” here and throughout the Regulations.

**Issue 3:** Section 343.12(d) states that “the Department shall give the requesting agency a reasonable opportunity to respond to protests.”

**Discussion:** What is reasonable may vary under different circumstances. Given the likely nature and makeup of GSAs, delineating a firm time, even with an opportunity for extension under certain circumstances, provides GSAs with a firm time horizon within which they know they need to operate, and will help mitigate unforeseen requirements for responding.

**Recommendation:** Provide that GSAs have 45 days to respond to protests for boundary modification requests. Provide for opportunities for extension granted by DWR on a case-by-case basis.

**Issue 4:** Article 5's title of “Supporting Information.”

**Discussion:** Every section in Article 5 states that the requesting agency “shall provide” the information required in the relevant section as part of the boundary modification request. Furthermore, in reference to the required supporting information, section 345.2(d) states that DWR may deny a request if “the requesting agency has failed to provide all required information[.]” Without clarification as to the information that is “required,” requesting agencies cannot be sure that they have fully complied with the requirements for a basin boundary

modification. Entitling Article 5 as "Required Information" or even "Required Supporting Information" (though the latter is redundant), would be a more accurate description of the following sections in that article, serve as a sign post to what information is required, and also provide clarity for requesting agencies and DWR in determining whether a boundary modification request is complete.

**Recommendation:** Change the title of Article 5 to "Required Information" and the title of section 344 to "Introduction to Required Information." See comment below.

**Issue 5:** Section 344.2(d) requires each request for boundary modification to include "name and contact information, including phone number, mailing address, and e-mail address, of the revision request manager."

**Discussion:** "Revision request" is an undefined term. The majority of the Regulations name what is understood in this section to be a boundary modification request as a "boundary modification request." Though section 341(t) defines a "revision request manager", the term is out of place with the structure of the rest of the Regulations, and should be changed to reflect the more often-cited "boundary modification request" as "boundary modification request manager."

**Recommendation:** Change "revision request manager" to "boundary modification request manager," and change section 341(t)'s term appropriately to "boundary modification request manager."

**Issue 6:** Section 344.8's title of "Local Support."

**Discussion:** Under the existing title, it is unclear to what boundary modification requests local support is required to be demonstrated. Under subsection (a), however, it is clear that this section is intended to apply to jurisdictional modification requests. Making that clear in the title of the section will provide clearer guidance to requesting agencies.

**Recommendation:** Change the title of section 344.8 to "Local Support for Jurisdictional Modification Requests."

**Issue 7:** Section 344.18 states that "Each request to modify a basin or subbasin shall include..."

**Discussion:** Each previous section in Article 5 follows a parallel structure, which this section departs from. Additionally, it is unclear what type of modification the section is referring to by the term "modify a basin or subbasin," though apparently the section is intended to apply to all boundary modifications.

**Recommendation:** Change the opening phrase to have parallel structure with previous sections: "Each request for a boundary modification shall include...."

**Issue 8:** Article 6's title of "Methodology and Criteria."

**Discussion:** The title is incomplete as to what the methodology and criteria apply to. The title should be changed to include specificity. Additionally, Article 6 does not provide for procedures for dispute resolution, which should be contemplated and provided for in the Regulations.

**Recommendation:** Change the title of Article 6 to "Methodology and Criteria for Evaluation and Dispute Resolution."

**Issue 9:** Section 345.2 states that "The Department may deny a request for boundary modification if it identifies significant concerns or is unable to resolve significant issues with the request including, but not limited to, any of the following:..."

**Discussion:** Neither "significant concerns" or "significant issues" are defined, although an

illustrative list of examples are provided. These may or may not be sufficient for requesting agencies to anticipate and avoid raising a “significant” concern or issue with DWR.

Furthermore, it is unclear at what point DWR will be “unable to resolve” these significant issues or concerns. The Regulations contain no provision or mechanism for dispute resolution so that all parties can clearly understand when attempted resolution of significant issues or concerns has failed.

**Recommendation:** Provide an exhaustive, as opposed to merely an illustrative, list of examples that will raise to the appropriate threshold of significance to trigger DWR denying a boundary modification request. Additionally, see comment below on inserting a dispute resolution process.

**Issue10:** Section 345.2(a)(1) and (2)’s use of the term “sustainable management.”

**Discussion:** “Sustainable management” is an undefined term. Under SGMA, the Water Code defines “sustainable groundwater management,” which points to the avoidance of “undesirable results” and therefore the regime under SGMA. Given the context of this section in the Regulations, it is likely that DWR intends the term “sustainable groundwater management.” If DWR has another standard in mind other than that already codified under SGMA, then the term must be defined so that requesting agencies can clearly understand by what criteria and under what legal regime a request may be denied by DWR.

**Recommendation:** Replace the term “sustainable management” in this section with “sustainable groundwater management” and make clear that the term is to be used in the same manner as codified under SGMA.

**Issue 11:** Section 345.2(b) uses as an example for denying a boundary modification request where “the requesting agency is unable to demonstrate a history of sustainable management of groundwater levels.”

**Discussion:** This point raises fundamental concerns about the challenges that achieving sustainable groundwater management will present given the state’s disparate geography, hydrology, and water and land use patterns.

First and foremost the term “history” is nebulous: how long of a history, and who will decide the duration of that history? The appropriate time will clearly be different for different regions, and DWR is not in the best position to determine that duration, nor is it appropriate for it to do so, given the intent of SGMA to push groundwater management down to the local level.

Furthermore, as discussed above, the term “history of sustainable management of groundwater levels” is undefined. SGMA does define “sustainable groundwater management” and provides a regime to determine a basin’s sustainability by avoiding a number of undesirable results. Narrowing the history to focus on groundwater levels presents an unsophisticated path toward defining sustainable management – an approach that SGMA rejects by focusing on a suite of “undesirable results,” which includes more than just groundwater levels.

Finally, it is not clear why DWR would require such a showing in the first place, as part of the intent of SGMA is to achieve sustainable groundwater management through local control – not to demonstrate a history of sustainable groundwater management. If the intent is for the state to aid local agencies in realizing sustainable groundwater management by avoiding undesirable results, then the utility of this subsection is unclear.

**Recommendation:** Delete this subsection. However, if the subsection remains, then replace existing, undefined language with terms defined under SGMA, and provide for a procedure

where the relevant GSA determines what the proper historical duration for the relevant basin should be given that basin's distinct geology, hydrology, and land and water use patterns.

**Issue 12:** Section 345.2(d)(3) requires that DWR evaluate the adequacy of a jurisdictional modification request based on "Current and historical land subsidence data demonstrating that no significant inelastic land subsidence has been observed in the proposed or existing basin."

**Discussion:** It is not clear why DWR would require data demonstrating that no "significant" – an undefined term under these regulations – inelastic land subsidence has been observed for a jurisdictional modification request. As an example, subsidence that occurred 50 years ago would not necessarily impede a local agency from managing a groundwater basin while avoiding undesirable results. If the intent is for the state to aid local agencies in realizing sustainable groundwater management by avoiding undesirable results, and if completing jurisdictional modifications assists in achieving this goal, then the utility of this subsection is unclear. Local agencies simply need to demonstrate that the boundary modification would not result in additional significant inelastic land subsidence.

**Recommendation:** Change section 345.2(d)(3) to "Current and historical land subsidence data demonstrating that no additional inelastic land subsidence will occur in the proposed or existing basin."

**Issue 13:** Section 345.2(e) uses as another example for denying a boundary modification request where "The proposed boundary modification could result in the isolation of areas with known groundwater management problems ...."

**Discussion:** This subsection raises similar issues to those raised by Section 345.2(b). First, "known groundwater management problems" is an undefined term. It is therefore unclear what constitutes a "groundwater management problem" – as opposed to, for example, the existence of an "undesirable result," which is defined and can be understood under SGMA. There are several options available under the existing SGMA regime to address this issue, including by using the "undesirable result" regime under the definition of "sustainable groundwater management," or by referencing areas or basins that have been designated as medium- or high-priority. The latter option likely would not serve well in discrete areas inside basins or subbasins, as such designations indicate the status of the basin or subbasin as a whole.

Second, the use of the term "known groundwater management problems" raises the issue of what is the proper level of government in achieving the goals of SGMA: the local or state level. It is unclear when these problems are "known," and by what entity and by what evidence the conclusion was arrived at. Presumably, by the language of the section, these problems are anticipated to be known by DWR, which would then possibly deny the boundary modification request. However, as the term "groundwater management problem" is currently undefined, and as there are no standards to aid either a requesting agency or DWR in determining whether these problems exist, requesting agencies cannot be sure that their requests will not be denied based on an unarticulated and arbitrary standard. Neither can DWR be sure that in denying a request because of this section that its denial is appropriate given the area's distinct geology, hydrology, and land and water use patterns.

**Recommendation:** Replace "known groundwater management problems" with a defined term such as "the presence of undesirable results" in the relevant area. The presence and acknowledgement of any undesirable results should be identified by the requesting agency, not

DWR. The requesting agency is in the best position to identify any significant and unreasonable effects, as defined under SGMA.

**Issue 14:** Section 345.4's title "Criteria for Evaluating Supporting Information."

**Discussion:** As discussed above, the information contemplated to support a boundary modification request is more properly understood as "required" information. As this section speaks directly to that required information, the section should be appropriately titled.

**Recommendation:** Change the title of section 345.4 to "Criteria for Evaluating Required Information."

**Issue 15:** Section 345 states that DWR "shall rely on the following information for evidence that the proposed basin can be sustainably managed ...."

**Discussion:** "Sustainably managed" is an undefined term. In the interest of clarity, the same terms employed under SGMA should be used in these Regulations. Likely, the Regulations contemplate "sustainable groundwater management" and the avoidance of undesirable results. Therefore, the definition of that term under SGMA would be appropriate here in place of "sustainably managed."

**Recommendation:** Change to "... for evidence that the proposed basin can be managed in a manner that can be maintained during the planning and implementation horizon without causing undesirable results."

**Issue 16:** Subsection 345.4(c) and (d) states that "For jurisdiction modifications ..."

**Discussion:** Undefined term. "Jurisdictional modifications" is likely intended.

**Recommendation:** Replace with "jurisdictional modifications."

**Issue 17:** Lack of an identified dispute resolution process for boundary modification requests where DWR has identified a deficiency.

**Discussion:** Section 345.2 provides that DWR may deny a request if, among other things, it is "unable to resolve significant issues with the request." However, it is unclear what procedures and processes will be followed to determine, both for the requesting agency and DWR, whether the issues presented are incapable of being resolved. Given the intent of SGMA to push groundwater management down to the local level, DWR should not be permitted to determine on its own that an issue is incapable of being resolved. Also, it would be inappropriate, given the regime of SGMA and these Regulations, for the requesting agency to determine on its own that an issue presented by a boundary modification request can and has been resolved. As discussed above, the terms "significant concerns" and "significant issues" will need to be defined and preferably articulated by an exhaustive list, as opposed to an illustrative one.

**Recommendation:** Assuming these definitional concerns are addressed, the Regulations should contemplate a dispute resolution process where key persons for both the requesting agency and DWR are able to present and respond to information provided by the other as to why there is or is not such an "issue" or "concern."

This process should identify who will represent each, with the "revision request manager" (see Issue 5, above) or his or her designee likely being appropriate for the requesting agency. This process should also allow for the confidential exchange of technical data to support either position. A sufficient and reasonable time should be provided for the resolution process, and in the event of an impasse, at a final attempt to avoid denial of a request, the Regulations

Westlands Water District's Comments on the Draft Basin Boundary Modification Regulations

should contemplate the matter being referred to a neutral third-party arbiter, perhaps a neutral and professionally-registered hydrogeologist or engineer.

As a final measure, the recommendation of that neutral arbiter should be binding on each entity, with the requesting agency retaining the right to challenge in court the final decision by DWR as to the sufficiency of its boundary modification request.

**Issue 18:** Section 346.6 states: "If, after revising the boundaries of a basin or establishing a new subbasin, the Department determines, based on substantial evidence, that assumptions regarding the sustainable management of the new basin or subbasins were incorrect, and that as a result the boundary modification should not have been allowed, the Department may restore the boundaries to the alignment that existed before the boundary modification or make other revisions consistent with this Subchapter."

**Discussion:** Allowing DWR to unilaterally determine that assumptions regarding the avoidance of undesirable results were incorrect contradicts the intent of SGMA to push sustainable groundwater management down to the local level. If DWR is unilaterally capable of determining that a set of assumptions were incorrect, and thus unilaterally capable of restoring the boundaries, then in effect local governance has been abrogated to the state. Given the intent and language of SGMA, it would be more appropriate for the Regulations to treat such a determination of incorrect assumption as a dispute that should be resolved under the dispute resolution process recommended above.

**Recommendation:** Delete the underlined text and replace with "the Department shall initiate the dispute resolution process as outlined in Section 345.6 with the appropriate groundwater sustainability agency or agencies affected by the modification to determine whether it is appropriate to restore the boundaries to the alignment that existed before the boundary modification or to make other revisions consistent with this Subchapter."

Once again, Westlands appreciates not only the significant time and energy on the part of DWR staff that went into developing these draft regulations, but also the opportunity to provide comments to ensure that the final regulations provide a coherent framework that compliments the intent and structure of SGMA. We look forward to continuing to ensure that the groundwater resources underlying our jurisdiction remain a sustainable and reliable supply of water for our farmers and families.

Sincerely,



Philip A. Williams  
Deputy General Counsel  
Westlands Water District